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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, ET AL., AND ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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QUESTIONS PRESENTED.

The respondents above named, hereinafter called "respondents," consider that petitioner's statement of the question presented is incorrect insofar as it attempts to raise a constitutional question, and is not sufficiently expressed in the terms and circumstances of this case as required by Rule 23-1(c) of this Court. Respondents submit that the question should be stated as follows:

Whether the Norris-LaGuardia Act withdraws jurisdiction from the District Court to enjoin a peaceful strike

by railroad employees in a "major dispute" over proposed changes in their collective bargaining agreements pending the carrier's appeal from a final decree on the merits which denied a permanent injunction and dismissed the suit, based on findings that no violations of the Railway Labor Act had been committed or threatened and conclusions that the proposed strike was lawful in all respects.

STATUTES AND RULES INVOLVED.

Petitioner fails to quote or cite under this heading, as required by this Court's Rule 23-1(d), F. R. C. P. Rules 65(e) and 82, which the Court of Appeals held (Petn. A-4) are involved in the interpretation of F. R. C. P. Rule 62(c), which is relied on by petitioner. These are, in pertinent part, as follows:

"Rule 65. Injunctions.

* * * * * * *

"(e) Employer and Employee; * * *

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; * * *"

"Rule 82. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

STATEMENT OF THE CASE.

Petitioner's statement of the case fails to show the basis for federal jurisdiction in the court of first instance, as required by Rule 23-1(g) of this Court.

The statement also says nothing of the nature of the underlying dispute or the basis of petitioner's claim to an anti-strike injunction. This omission, coupled with peti-

tioner's statement of the question presented, could create the erroneous impression that petitioner established its case for injunctive relief at the hearing on the merits in the trial court, and that, but for the Norris-LaGuardia Act, the carrier would have been granted a permanent injunction. A brief additional statement of the nature of the case is therefore necessary.

This action grows out of a dispute between the railroad and its employees concerning private non-contributory pension plans (App. 10). Two of such plans had been included in collectively bargained agreements previously made by the parties, the second of which was to expire October 31, 1959 (App. 10-11). On October 1, 1959 the unions served notice on the railroad under Section 6 of the Railway Labor Act, proposing that the expiring plan (Plan II-B) be continued in effect until a new plan (Plan II-CR) could be substituted (App. 10-11). Efforts during the following 18 months to settle the matter through negotiation and mediation failed, and a strike was set for May 20, 1961 (App. 11-16).

On May 19, 1961 the carrier sued to enjoin the proposed strike, charging that the unions had violated the Railway Labor Act (1) by threatening to strike for increased pension benefits to retired employees, (2) by failing to bargain in good faith, (3) by threatening to strike during mediation, and (4) by threatening to strike over pensions, an allegedly non-bargainable issue (App. 17-20).

After trial on the merits the District Court found against petitioner on each of these grounds (App. 457-461) and concluded that the proposed strike was lawful under the Railway Labor Act (App. 462).

The employees involved in this case have thus far established on the merits in two courts that the strike action they proposed to take on May 20, 1961 was lawful in all

respects. Nevertheless, they have been enjoined since May 19, 1961. The injunction by the District Court pending appeal, issued June 22, 1961, is still in effect because the Court of Appeals for the Seventh Circuit has stayed mandates on its judgments reversing the injunction pending appeal and affirming the District Court's decree on the merits.

REASONS FOR DENYING THE WRIT.

Respondents here state briefly their answers to petitioner's declared reasons for granting certiorari, following the order in which they appear in the petition, pages 5-6, and respondents thereafter state further reasons for denying the writ:

1. The issue sought to be raised is important, but not of such peak gravity and general importance that review is needed. It is no more important now than it was when presented in *Order of Railroad Telegraphers* v. *Chicago and North Western R. Co.*, 362 U. S. 330 (1960), in which case, although certiorari had been granted and the issue was squarely presented, this Court declined to decide it (362 U. S. 330, at 342). No constitutional question is involved here as petitioner apparently infers.

2. The decision sought to be reviewed is not shown to be in conflict with any decision by another court of appeals on the same matter. No decision on the exact question in another circuit has been cited, and the case in another circuit which is closest on its facts to this one is in accord: *Chicago, Rock Island and Pacific Railroad Company* v. *Switchmen's Union*, 2nd Cir., 292 F. 2d 61 (1961), certiorari denied June 25, 1962, Docket No. 237, Advance Reports No. 6, 8 L. ed. 2d 806.

3. The decision sought to be reviewed is not inconsistent with the same court's decision on an identical ques-

tion in *Chicago & Northwestern Ry. Co.* v. *Order of Railroad Telegraphers*, 264 F. 2d 254, at 255-256 (1959). That decision held that a permanent injunction should have been granted and did not decide the issue of an injunction pending appeal (Petn. A-3).

4. The decision sought to be reviewed is not in conflict with the principles of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Chicago, River & Indiana Railroad Company*, 353 U. S. 30 (1957). That case involved a dispute referred to the National Railroad Adjustment Board, whereas this case admittedly involves a dispute concerning contract changes (Petn. A-16), in which this Court has held, as noted in the *River Road* decision, that Norris-LaGuardia is fully applicable (353 U. S. 42). *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

5. The decision sought to be reviewed is not wrong. It is correct in following the clear command of the Norris-LaGuardia Act as applied to anti-strike injunctive orders in a bargaining dispute under the Railway Labor Act. Both of these remedial Acts have contributed to the orderly discharge by the lower courts of their responsibilities.

6. The Norris-LaGuardia Act, rather than the decision sought to be reviewed, withdrew power from the District Court to issue an anti-strike injunction pending appeal. This Act *requires*, in labor cases, a departure from the "usual course of judicial proceedings" insofar as they may involve anti-strike injunctions.

7. The question presented is important, but the decision sought to be reviewed has provided a clearly correct answer under the plain provisions of the Norris-LaGuardia Act.

8. As noted above in paragraph 1, the question sought to be reviewed was previously before this Court in the

Telegraphers' case under substantially the same circumstances, and this Court considered it inadvisable to decide the question.

Respondents now briefly state further reasons for denying the writ:

9. This case in the Court of Appeals also involved the question whether, in view of the carrier's failure to establish *any* grounds for injunctive relief on the merits, it was not an abuse of discretion to grant the injunction pending appeal, irrespective of Norris-LaGuardia. Cf. *Virginian Railway Co. v. United States*, 272 U. S. 658, 672 (1926). Review on certiorari of the single issue sought to be presented by the petition would leave undecided this other potentially controlling question.

10. The granting of certiorari here would presumably require granting the writ on the contemporaneous petition to review denial of the permanent injunction on the merits; otherwise the issue sought to be presented here could become moot.

11. Petitioner has not fully complied with the provisions of Supreme Court Rule 23-1(c), (d) and (g), as noted above under "Questions Presented," "Statutes and Rules Involved" and "Statement of the Case."

12. Finally, recognizing that all pleas in certiorari matters are addressed to the Court's sound discretion in granting or denying the writ, respondents invite attention to the fact that although two courts have, after hearing the merits of the major labor dispute involved here, found respondents innocent of any committed or threatened wrongdoing, injunction orders against respondents have been in effect continuously since May 19, 1961.

ARGUMENT.

Importance of Question Presented.

The importance of questions raised in appealed cases naturally looms large in the minds of the litigants themselves, and this case is no exception. Respondents agree with petitioner that this is an important case, although they cannot subscribe to such astronomical terms as "first magnitude," which petitioner uses to describe it (Petn. 6, 7). The standards outlined in this Court's Rule 19 seem to require a more down-to-earth approach, and respondents will attempt to use that one.

At the outset the fact must be faced, in judging the importance of the question sought to be reviewed, that this precise issue was before the Court in 1960. *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U. S. 330. After granting certiorari, the Court decided the case on the merits of the question whether a permanent injunction should issue, and expressly declined to decide the "subsidiary" question of the injunction pending appeal (362 U. S. 330, at 342) (Petn. 7). Petitioner seems to feel that the Court's non-action in 1960 is in itself a ground for action now. We cannot agree, for several reasons. Petitioner also seeks by petition (Docket No. 246) filed contemporaneously with this one to review here the permanent injunction issue; therefore the question of an injunction pending appeal, although squarely presented in both cases, is as "subsidiary" here as it was in *Telegraphers*. Petitioner has pointed to nothing which makes this question any more important now than it was in 1960, or why, if it was inadvisable for the Court to decide the point after granting certiorari in *Telegraphers*, the writ should be granted here for that single purpose.

The *Telegraphers* case involved, as this one does, a carrier-employee "major dispute," *i.e.*, one involving a threatened strike over proposed changes in a collective bargaining agreement, as distinguished from a "minor dispute" involving interpretation or application of an existing agreement referable to the National Railroad Adjustment Board, such as that involved in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

The main question on the merits in *Telegraphers* was whether the underlying dispute (the union's request for a contract rule against proposed elimination of certain jobs) presented a bargainable issue. The majority held that this issue was bargainable under the Railway Labor Act. Four justices dissented on this point, but none expressed any doubt about the Court's holding that the Norris-LaGuardia Act prohibits issuance of a permanent injunction in a dispute which is subject to mandatory collective bargaining under the Railway Labor Act.

The Court explained its reason for granting certiorari in *Telegraphers* as follows (362 U. S. at 334-335):

> "On appeal the Court of Appeals did grant a permanent injunction upon its decision that 'The District Court's finding that the proposed contract change related to "rates of pay, rules, or working conditions," and was thus a bargainable issue under the Railway Labor Act, is clearly erroneous.' It held that the Norris-LaGuardia Act did not apply to bar an injunction against this strike and we granted certiorari, 361 U. S. 809, to consider this important question."

It thus seems evident that the question whether the dispute was subject to mandatory bargaining under the Railway Labor Act was the important question which prompted the granting of certiorari in *Telegraphers*, not the question of an injunction pending appeal. If this premise is correct,

then the Court's disposition of that case furnishes no support for petitioner's contention as to the importance of the question here sought to be reviewed.

Asserted Conflict With Other Circuits.

Petitioner asserts that the decision in question "is in conflict with the decisions of every other court of appeals and district court which has dealt with the question" (Petn. 5-6). Respondents have searched the petition without finding any reference to a supposedly conflicting decision by another court of appeals on the question of an anti-strike injunction pending appeal. No reference was found to a conflicting district court decision, except the trial court in which this suit originated (Petn. A-8).

The petition is curiously silent regarding the case from another circuit which most closely resembles this case on its facts. *Chicago, Rock Island and Pacific Railroad Company* v. *Switchmen's Union*, 2nd Cir., 292 F. 2d 61 (1961), certiorari denied June 25, 1962, Docket No. 237, Advance Reports No. 6, 8 L. ed. 2d 806. The opinion of the Court of Appeals in the instant case cites the *Rock Island* case as providing a guide for the decision on which review is here sought (Petn. A-4, A-5). In the *Rock Island* case, which involved a "major dispute" over wages, the district court had issued a temporary injunction against a strike pending hearing on the merits, based on findings that a "sufficient showing" had been made that the union had not acted in good faith and that "difficult and doubtful" questions were presented. 187 F. Supp. 581, at 584 (1960). The Court of Appeals for the Second Circuit held that such findings could not overcome the jurisdictional bar of Section 4 of the Norris-LaGuardia Act (29 U. S. C. § 104):

> "To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has

> violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent."

In our case the Court of Appeals could find no material difference within the Norris-LaGuardia Act between an injunction pending hearing on the merits in the trial court and one pending hearing on the merits on appeal (Petn. A-5). Indeed, it would appear that so far as the objects and purposes of Norris-LaGuardia are concerned, a better apology could be made for an injunction entered after preliminary hearing has indicated to the trial judge that the strike may be unlawful than in a case, such as ours, in which the anti-strike injunction was issued after the trial court had decided on the merits that the proposed strike was lawful. In the former case, at least the court thought and acted in the same direction.

Respondents submit that these two cases indicate the Second and Seventh Circuits are in accord as to the effect of Norris-LaGuardia on anti-strike injunctions *pendente lite* in major disputes under the Railway Labor Act, and that there is no reason to suppose that there will be conflicts elsewhere. At present, there is no conflict to be resolved. Certiorari should not be granted on this ground.

Asserted Conflict With Chicago River Case.

Petitioner asserts (Petn. 6) that the decision sought to be reviewed is in conflict with the principle laid down by this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Company*, 353 U. S. 30 (1957).

Petitioner's reliance on the *Chicago River* case simply

reflects petitioner's insistence on ignoring the fact that the disputes there had gone to the National Railroad Adjustment Board, whereas the dispute involved here was not and could not be referred to the Adjustment Board for settlement. The underlying disputes in the *Chicago River* case were grievances arising under an *existing* bargaining agreement. The instant case involves a dispute over the terms of a new agreement. In *Chicago River* the disputes had been referred to the Adjustment Board and were pending before it at the time of the proposed strike. The Court traced the history of the establishment of the Board to handle disputes such as were there involved (353 U. S. at 34-40), and held that Norris-LaGuardia did not withdraw jurisdiction to issue an anti-strike injunction under such circumstances. The Court said (353 U. S. at 39):

> "The only question which remains is whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. * * *
>
> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

More recently the Court has emphasized its intention to limit the rule of the *Chicago River* case to situations such as presented there under the Railway Labor Act. *Sinclair Refining Co.* v. *Atkinson*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 440, at 450.

Respondents submit that the decision in the instant case in no way conflicts with the principle laid down in the *Chicago River* case.

Petitioner's Reliance on Frankfurter and Greene, The Labor Injunction.

Petitioner cites (Petn. 14-15) Frankfurter and Greene, *The Labor Injunction* (1930), as supporting petitioner's view that the Norris-LaGuardia Act was not intended to affect anti-strike injunctions pending appeal. Respondents submit that such reliance is misplaced. These authors said (pages 224-225):

> "Another grave defect in the actual practice governing labor injunctions is dilatoriness in appeals. Our Table of Federal Cases shows the inordinate length of time that elapses between the first issuance of a decree and its consideration by an appellate tribunal. Time is of the essence in a strike. If modification or reversal of an injunction is to have any value, it must come before the energies of a strike have been spent."

The Table of Federal Cases referred to above (Id., Appendix II) indicates that in the majority of cases studied, the time between final injunction and decision on appeal was more than two years in the majority of cases in which appeals were taken.

Petitioner quotes (Petn. 15) these authors as having said (at page 80) "The tentative truth *rests* in making ultimate truth irrelevant." The correct quotation is: "The tentative truth *results* in making ultimate truth irrelevant." (Italics added.)

Frankfurter and Greene do not support petitioner's position.

Answer to Petitioner's Contention That the Norris-LaGuardia Act Does Not Affect "Inherent Judicial Power" to Enjoin Pending Appeal.

The authorities cited by petitioner (Petn. 9-13) which did *not* involve labor disputes or which were decided prior to the Norris-LaGuardia Act throw no light on the question of whether the writ should be granted. At most, they only demonstrate the need for this special legislation in labor cases.

The constitutional power of Congress to define and limit, in the manner provided in the Norris-LaGuardia Act, the jurisdiction of lower federal courts to issue injunctions in labor cases has long since been settled beyond any doubt. *Lauf v. E. G. Shinner and Co.*, 303 U. S. 323, 330 (1938). The constitutionality of the Norris-LaGuardia Act was not challenged below, and it is too late to inject any such question here.

If it be assumed that inferior federal courts once had, in labor cases, "inherent power" to issue injunctions pending appeal, it is nevertheless true that they held that power subject to the will of Congress to limit or withdraw it in labor cases. It is therefore useless to talk of the supposed necessity of "accommodating" the jurisdictional limitations of Norris-LaGuardia with the "inherent judicial power, granting jurisdiction" (Petn. 12-13).

Unless Section 4 and Section 7 of Norris-LaGuardia were meant to except anti-strike injunctions pending appeal from their limitations on jurisdiction, or unless these provisions have been repealed, such injunctions are prohibited. The opinion of the Court of Appeals in the instant case treats the question as one of interpretation, involving also F.R.C.P. Rules 62(c), 65(c) and 82 (Petn. A-3 to A-7). Petitioner insists that the Court was wrong. The opinion needs no defensive encomiums from respondents.

Since the question on petition for certiorari is whether the decision needs reviewing, not whether it needs reversing, respondents simply point out that the essence of petitioner's complaint against the decision on this point is that Norris-LaGuardia has been given "literal application" in this case (Petn. 16).

Asserted Conflict With Mine Workers' Case.

Petitioner contends (Petn. 17) that the opinion of the Court of Appeals has disregarded *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947), which petitioner asserts is extremely important here, inferring that the instant decision is in conflict. The employer in the *Mine Workers* case was the United States Government, to which the Court held the Norris-LaGuardia Act did not apply. That holding was the primary basis for the Court's decision that it was criminal contempt to defy a temporary restraining order which the district court had entered immediately after the suit was commenced.

The instant case does not raise any question about the temporary restraining order which was entered by the trial court at the inception of this case. In fact, the restraining order was continued in effect in this case by agreement of the parties pending trial on the merits (Petn. 3), and the order was, of course, obeyed. It is true that the opinion in *Mine Workers* also stated the alternative ground that a restraining order entered to determine the question of jurisdiction, even if jurisdiction were later found lacking, must be obeyed under penalty of contempt. But obviously, since the instant case did not involve any dispute over a temporary restraining order, that language has no bearing on the facts presented here, and no conflict has been shown. Cf. *Re Green*, decided May 21, 1962, Advance Reports No. 3, 8 L. ed. 198, at 201, 203.

Answer to Petitioner's Contentions Concerning Consequences of Withholding Injunctive Relief After Railroad Has Lost on the Merits.

In context pitched in such ominous tones as to make one fear that the very fabric of our society may be torn asunder unless the situation is remedied, petitioner makes this statement regarding the effect of the decision in the instant case (Petn. 19):

> "A decision on the merits against the plaintiff-carrier in a Railway Labor Act injunction case will immediately free the defendant-labor organization to strike to achieve its demands."

We agree that the decision does have this effect: when the decision on the merits is that a proposed strike is lawful, the court's deeds will follow its words and the court will not condemn what it has just approved. The right of railroad employees to strike has many prerequisites, but they do not include prior establishment of an unbroken line of court decisions approving their particular proposed strike, ending with the denial of the carrier's last petition for rehearing in the court of last resort.

Concerning the effect of this, let us consider what could have happened in this case if the anti-strike injunction pending appeal had been refused. The carrier could have appealed immediately from such refusal, and would have been entitled to expeditious and preferential hearing as provided in Section 10 of the Norris-LaGuardia Act in cases involving issuance or *denial* of "any temporary injunction" in a labor dispute (29 U. S. C. § 110). Meanwhile, the employees would be free to set a new strike date if they chose, and the carrier could then take such measures as it felt were necessary or proper to avoid a work stoppage, including the obvious one of putting pension Plan II-CR into effect for some period. The additional cost involved would

have been about 3¢ per hour (App. 185, 271-272). During the pendency of the appeal, or appeals, the parties could and should bargain in good faith toward a negotiated permanent settlement of the underlying dispute, and if one were reached that would, of course, put an end to the litigation. If the carrier won its appeal or appeals, it could then take such action as seemed to it appropriate. These alternatives do not appear necessarily ruinous, either to public or private interests.

Respondents do not expect petitioner to agree that the above procedures are preferable, from its point of view, to an anti-strike injunction which issues regardless of the outcome of the trial on the merits and puts all economic pressures on the side of the carrier in resolving the dispute. But remedial federal statutes such as the Norris-LaGuardia Act, the Railway Labor Act and the Wagner Act have changed that, and our present national labor relations policy in this respect is now as stated in *N. L. R. B.* v. *Insurance Agents' International*, 361 U. S. 477 (1960), at 489:

> "Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the *most serious effect upon individual workers and productive enterprises*, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side."

Under this policy, it is indeed true that a "decision on the merits against the plaintiff-carrier in a Railway Labor Act injunction case will immediately free the defendant-labor organization to strike to achieve its demands" (Petn.

19). The employer cannot expect to see a court's "inherent power" to issue an anti-strike injunction pending appeal rise like some mighty phoenix from the ashes of the employer's case on the merits, turning defeat into victory for the employer, and victory into defeat for the employees. Justice now talks and walks in the same direction.

CONCLUSION.

Respondents submit that the petition does not disclose sufficient reasons for granting a writ of certiorari, and that it should be denied.

Respectfully submitted,

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July 30, 1962.